No. 87-722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VELMA DODD, ADMINISTRATRIX
OF THE ESTATE OF DWAYNE DODD, *Petitioners*,

v.

CITY OF NORWICH AND ERIC LARSON, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a municipality be held liable in a 42 U.S.C. Sec. 1983 action where a court has found that the police officer breached no duty and caused no constitutional deprivation?

II. Whether or not *Tennessee v. Garner*, 471 U.S. 1 (1985) establishes the standard by which lower courts are to determine the reasonableness of seizures under the Fourth Amendment?

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827 F. 2d 1 (2d Cir., 1987)

STATEMENT OF CASE

On October 13, 1981 at approximately 7:00 p.m., the petitioner's decedent, Dodd, and an accomplice were robbing a home in Norwich, Connecticut. Officer Rice and the respondent, Officer Eric Larson, were dispatched to the location of the felony in progress. In was dark. They heard noises inside the house. The respondent Larson proceeded to the rear of the home and Officer Rice approached the house from the front side. He saw two males inside the front door looking directly at him. Officer Rice yelled to the respondent Larson to stay at the rear of the house, as there were two males attempting to leave by an open window. Officer Larson observed Dodd stick his head out the window. Officer Larson did not know how many other persons were in the house and whether they or Dodd were armed. With gun drawn for his own protection, Officer Larson advised Dodd to exit through the window and to lie face down with his arms outstretched. Although Dodd lay on the ground, he did not comply with Officer Larson's orders in that he concealed one arm under his body. As Officer Larson did not know whether Dodd or any others in the house were armed, he approached Dodd with his gun unholstered but uncocked. Officer Larson had taken the precautionary measure of keeping the gun uncocked so as to make its discharge more difficult. His concern was that Dodd should be handcuffed. He knelt and handcuffed Dodd's left wrist. As Officer Larson reached for the right wrist, Dodd jerked forward grabbing the uncocked revolver in Larson's hand and pulling the revolver and hand toward himself. Larson instinctively jerked back and the gun went off.

After hearing all evidence and argument, the District Court determined that Larson was not negligent; he breached no duty to Dodd and Dodd suffered no constitutional deprivation. Judgment entered for the defendants.

The plaintiff appealed. The Circuit Court initially reversed in part on an issue not claimed, briefed or argued. The respondents filed a petition for rehearing, requesting that the Circuit Court consider significant findings of fact and law that had not been addressed. The Circuit Court granted the petition. After briefs and argument, the Circuit Court reversed itself and affirmed the District

Court's decision in its entirety. The Circuit Court found that the shooting was not for the purpose of seizing Dodd and was a pure accident. (See Decision of Circuit Court of Appeals on Reargument, Appendix to Petition for Writ of Certiorari at 3c). The Circuit Court found no Fourth Amendment violation as a matter of law. The Circuit Court also followed the precedent established by the Supreme Court in the *City of Los Angeles v. Heller*, (1986) and reasoned that as the decedent did not suffer a constitutional injury, the city could not be held liable for any alleged constitutional violation. Whether a department policy is unconstitutional or authorized certain action is irrelevant if there was no constitutional injury. (See Decision on Reargument, Appendix to Petition for a Writ of Certiorari at 5c).

Moreover, the Circuit Court stressed that the District Court found that Larson's actions were "not negligent and were, in fact, reasonable" (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 6c) and that "the procedure followed by Larson was reasonable." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 7c). These findings render the issues raised by the petitioners academic.

The plaintiff/appellant then filed this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This action was brought pursuant to 42 U.S.C. Sec. 1983. The petitioners claim that the City of Norwich adopted a policy which was unconstitutional and which resulted in an unreasonable seizure for the purposes of the Fourth Amendment to the United States Constitution. The District Court found that any action taken by Officer Larson was reasonable and further, that Larson breached no duty to Dodd and that Dodd received no constitutional injury as a result of any action of the respondent, Larson. Since there was no duty breached to Dodd and since he received no constitutional injury, no claim can be made that he received a constitutional injury as a result of any department policy.

The facts of this case and findings of the District Court and Circuit Court of Appeals do not merit review by the Supreme Court of the United States on the issues framed by the petitioner.

The petitioner has failed to raise the special and important reasons necessary to compel the Court to exercise its judicial discretion to accept the Writ of Certiorari. There is no conflict with decisions of other Circuit Courts of Appeal. The Circuit Court has not acted in any way to merit the exercise of the Court's supervisory power. In fact, the Circuit Court of Appeals in its decision upon reargument expressly followed the case law as set forth by the Supreme Court and refrained from expanding or deviating from the Supreme Court rulings.

The petitioner has not raised an important question of federal law supported by the findings of facts of this case which has not been settled by the Supreme Court of the United States.

The petitioner has not satisfied the requirements of Rule 17 of the Rules of the Supreme Court of the United States and has framed issues which are academic in light of the facts found in this case and attempts in essence to seek an advisory opinion on facts outside the scope of this case.

The respondents respectfully request that the Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I. A Municipality May Not Be Held Liable In A 42 U.S.C. Sec. 1983 Action Where The Court Has Found That The Police Officer Breached No Duty And Caused No Constitutional Deprivation Pursuant To City of Los Angeles v. Heller, 475 U.S. 796 (1986).

In the complaint underlying this litigation, the petitioner alleged that Officer Larson had deprived Dodd of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights. The District Court found that Officer Larson had breached no duty to the plaintiff and did not act negligently. The District Court concluded that Dodd did not suffer a deprivation of a constitutional right. The Circuit Court examined the question of whether or not Dodd suffered a deprivation of constitutional rights secured by the Fourth Amendment of the United States Constitution. At a rehearing when the issue was first addressed the Circuit Court found no violation as a matter of law. It follows that if Dodd's constitutional rights were not violated, he did not suffer a constitutional injury. The mere fact that a fatal accident occurred does not raise the injury to a constitutional level.

Monell v. The Department of Social Services of the City of New York, 436 U.S. 658 (1978) stands for the proposition that a municipality cannot be held liable on the basis of respondeat superior. It must first be shown that the complainant suffered a violation of a constitutional right and such violation was caused by the implementation of a municipal policy. The instant case fails as there was no violation of a constitutional right. Without a constitutional injury, no claim can be made that a policy caused a constitutional injury. In any event, the District Court found that the policy followed by the police officer was reasonable.

In *City of Los Angeles v. Heller*, 475 U.S 796 (1986), the plaintiff, claiming arrest without probable cause and with use of excessive force, sued a police officer and the municipality. When stopped for driving while under the influence, the plaintiff became belligerent. An officer attempted to cuff him. An altercation ensued and the plaintiff fell through a window. The Court held that if a police officer inflicted no constitutional injury, it is incon-

ceivable that the city can be liable. *Heller*, 106 S. Ct. at 1573. Moreover, where "the person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is quite beside the point." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 5c citing *Heller*.)

The *Heller* case does not insulate a municipality from liability under all circumstances nor does the Circuit Court's decision as the petitioner suggests. An example of this is where an officer is found not liable under a good faith immunity defense and yet, where constitutional rights have been found to be violated. See *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985). The instant case raised no such defense. The District Court and Circuit Court found no constitutional violation had occurred. *Heller* makes clear that for a plaintiff to recover it must suffer a constitutional violation and such constitutional violation must flow from an unconstitutional policy. It further found if there is no constitutional violation, liability cannot be predicated on any policy regardless of its constitutionality. Finally, the District Court in this case has found that the policy in question was reasonable.

The Circuit Court of Appeals properly followed the law established by the Supreme Court as it applies to the facts of the instant case. The Circuit Court on rehearing refrained from establishing new law without direction of this Court.

II. Tennessee v. Garner, 471 U.S. 1 (1985) Establishes The Standard By Which Lower Courts Are To Determine The Reasonableness Of Seizures For The Purpose Of The Fourth Amendment To The United States Constitution.

The Supreme Court sets fourth the standard by which lower courts are to review the reasonableness of seizures for the purpose of the Fourth Amendment in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* bars the deliberate use of deadly force to seize an unarmed, fleeing, suspected felon. *Garner*, 471 U.S. at 11. In *Garner*, a police officer followed a fleeing suspect. He was able to see the suspect's face and hands and was aware that the suspect was

unarmed. Feeling too fat to catch the suspect, he shot the suspect deliberately and intentionally in the back of the head as the suspect began to climb over a fence. In the instant case, the suspect had been apprehended; it was not yet known if he were armed; the shooting occurred inadvertently during a struggle initiated by the decedent in an attempt to disarm the officer. The shooting was an accident as found by the District Court and the Circuit Court and as conceded by plaintiff's expert and was not for the purpose of seizing Dodd. The Circuit Court found that there was no violation of Dodd's Fourth Amendment Rights as a matter of law. In dicta, the Circuit Court stated that "it makes little sense to apply a standard of reasonableness to an accident. If such a standard were applied, it could result in a Fourth Amendment violation based on simple negligence." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 3c.) It must be remembered that Officer Larson was found not to have acted negligently and therefore it is merely academic to determine whether or not negligence may form a basis for liability under the Fourth Amendment. Moreover, the policy followed was found to be a reasonable one and the plaintiff offered no evidence that this was nothing more than a single incident or single accident.

The fallacy in the petitioner's analysis of the Circuit Court's opinion is further evidenced by the framing of the third question (See Petition for Writ of Certiorari, Questions Presented and Argument Section III). The petitioner represents in the third section of the argument in support of her Petition for Writ of Certiorari that the Circuit Court predicated its opinion on the conclusion that the seizure was completed by placing the handcuff on Dodd. This is not so. In fact, the Circuit Court stated that the shooting did not occur for the purpose of seizing Dodd and that the shooting was a pure accident. The Circuit Court stated that the shooting was inadvertent and occurred at a time when the plaintiff had apparently surrendered. The shooting occurred not as a result of the seizure, but as a result of Dodd's own deliberate actions. The issue for the purpose of the reasonableness analysis is not when the seizure was completed or whether seizure is a process but whether or not Officer Larson shot Dodd in order to seize him. The facts found by the lower courts show that the shooting was

a pure accident and not the result of any action on the part of Officer Larson, but rather the result of Dodd's lunging forward in an attempt to disarm Officer Larson.

It had been determined by the District court that Larson had his gun unholstered for his own protection and that it was not negligent for Larson to have his finger on the trigger of the uncocked gun. If his actions were not negligent, they were reasonable. The shooting was not for the purpose of effectuating the arrest. His conduct and the policy he followed were reasonable under the circumstances.

CONCLUSION

The respondents respectfully submit that the petitioners have failed to demonstrate a basis for the court to exercise its judicial discretion to grant the Petition for Certiorari. The Circuit Court of Appeals has properly applied the law as set forth by the Supreme Court in *Monell v. Department of Social Services, City of Los Angeles v. Heller* and *Tennessee v. Garner.* The Circuit Court judiciously refrained from expanding the law as established by the Supreme Court where the facts of the case did not so merit. The questions presented in the petitioner's Petition for Writ of Certiorari seek the Court's review of questions which are rendered academic by the facts and the law of this case.

The respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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